IN THE COURT OF APPEALS OF IOWA

No. 0-065 / 09-0951
Filed March 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHAD ALLEN BENESH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

Chad Allen Benesh appeals from his conviction for the offense of assault domestic abuse causing bodily injury. **REVERSED AND REMANDED.**

Aaron D. Hamrock of McCarthy & Hamrock, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brian J. Williams, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Chad Allen Benesh appeals from his conviction for the offense of assault domestic abuse causing bodily injury (Count II). He contends the district court erred in denying (1) his motion for judgment of acquittal because the jury's finding of guilt on Count II was inconsistent with the jury's acquittal on his charge of assault domestic abuse with intent to cause serious injury (Count I); (2) his motion for a mistrial, asserting the court improperly questioned a defense witness displaying bias to the jury; and (3) his motion for judgment of acquittal because there was insufficient evidence on the cohabitation element to support the domestic abuse conviction. We reverse and remand the case to the district court to enter judgment on the lesser-included offense of assault causing bodily injury.

***I. Background Facts and Proceedings*.**

Chad Benesh and Kim Neelans met on the Internet sometime in late March or April 2007. Benesh subsequently moved in with Neelans in the fall of 2007. Their intimate relationship ended, but they continued living together in Neelans's house. Neelans later moved to a condominium, and Benesh moved with her.

On November 13, 2008, Neelans returned home and discovered Benesh in bed with Maureece McDuffee. A fight ensued between Neelans and Benesh, and the police were called to the residence. Neelans was ultimately treated for a broken rib following the incident.

Thereafter, the State filed a two-count trial information charging Chad Benesh with assault domestic abuse with intent to cause serious injury, in violation of Iowa Code section 708.2A(2)(c) (2007) (Count I), and assault

domestic abuse causing bodily injury, in violation of section 708.2A(2)(b) (Count II). Benesh pled not guilty.

A jury trial commenced on March 24, 2009. Neelans, the victim, first testified the intimate relationship with Benesh "just seemed to 'die on the vine' . . . I would have to say the winter of '07." When pinned down to a specific time period, she testified the intimate part of the relationship had been over since October 2007. Benesh similarly testified he had not been intimate with Neelans during the year prior to November 2008.

Maureece McDuffee testified as a defense witness. After the State and Benesh's counsel were done examining the witness, the court asked the witness a few questions. The following exchange occurred:

> [THE COURT]: Ma'am, you testified . . . that you were, quote, "so ashamed." What were you ashamed of? A. I just—felt like the other woman, and I felt—I was humiliated and ashamed, because I knew I hadn't done anything wrong, but yet I felt, the way [Neelans] was talking, that I was guilty of something.
>
> [THE COURT]: Ma'am, once it became clear to you that [Benesh] either had been arrested or had been charged, you did not go to the police to give them a statement? A. I didn't know I had to. I thought they would contact me if they needed me.
>
> [THE COURT]: How would they have information as to how to get in touch with you? You didn't volunteer who you were.
>
> [BENESH'S TRIAL COUNSEL]: Your honor, I'm going to object to the questions—
>
> [THE COURT]: The objection is noted, for the record. It's in the record.
>
> [BENESH'S TRIAL COUNSEL]: No. With respect to that particular question, a separate objection, your honor.
>
> [THE WITNESS]: Would you repeat it, please?
>
> [THE COURT]: You said that you did not give the police a statement. Would there have been some other way they could have otherwise identified you, without you coming over, as far as you know? A. I thought when they took [Benesh's] statement, they would get ahold of me.

The court then asked if either party had further examination of the witness based upon its questions, and both the State and Benesh's counsel asked McDuffee a few questions.

At the close of the evidence, Benesh made a motion for a judgment of acquittal, asserting insufficiency of the evidence. The district court denied Benesh's motion. The parties proceeded to discuss jury instructions in the case. Thereafter, Benesh moved for a mistrial on the basis that the court's earlier questioning of McDuffee was improper. Specifically, Benesh argued that three questions asked by the court were intended to impeach his witness. The court denied the motion, stating:

> The nature and the text of the questions asked were designed to clarify statements that that witness made, or to clarify statements, if she knew, that were based upon other evidence presented. Your request for a mistrial is absolutely denied.

The jury was then instructed in the matter. Instruction fourteen, regarding Count I, instructed the jury:

> The State must prove all of the following elements of the crime of assault domestic abuse with intent to cause serious injury:
>
> 1. On or about the 14th day of November, 2008, [Benesh] did, without justification, an act which was *meant*[1] to cause pain or injury; result[ing] in physical contact which was insulting or offensive; or place[d] [Neelans] in fear of immediate physical contact which would have been painful, injurious, insulting, or offensive to her.
>
> 2. [Benesh] had the apparent ability to do the act.
>
> 3. At the time, [Benesh] *intended to cause* a serious injury to [Neelans], as defined in Instruction [number eighteen].[2]

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[1] The State acknowledges that the difference in wording between the first elements of the two offenses ("meant" in instruction fourteen and "specifically intended" in instruction fifteen) was likely inadvertent and not significant. Likewise, Benesh argues the first two elements of both instructions are "virtually identical" since "one cannot 'specifically intend' to do an act that he did not 'mean' to do."

[2] Instruction number eighteen defined only the term "serious injury."

> 4. The act occurred between family or household members who resided together at the time or the incident or during the year previous to the incident. . . .
>
> If the State has proven all of these numbered elements, [Benesh] is guilty of assault domestic abuse with intent to inflict serious injury. If the State has proven only elements 1, 2, and 3, [Benesh] is guilty of assault with intent to inflict serious injury. If the State has proven only elements 1, 2, and 4, [Benesh] is guilty of assault domestic abuse. If the State has proven only elements 1 and 2, [Benesh] is guilty of assault. If the State has failed to prove either element 1 or 2, [Benesh] is not guilty.

(Emphasis added.) Instruction fifteen, regarding Count II, instructed the jury:

> The State must prove all of the following elements of the crime of assault domestic abuse causing bodily injury:
>
> 1. On or about the 14th day of November, 2008, [Benesh] did, without justification, an act which was *specifically intended*[3] to cause pain or injury; result[ing] in physical contact which was insulting or offensive; or place[d] [Neelans] in fear of immediate physical contact which would have been painful, injurious, insulting, or offensive to her.
>
> 2. [Benesh] had the apparent ability to do the act.
>
> 3. [Benesh]'s act *caused* a bodily injury to [Neelans], as defined in Instruction [number nineteen].[4]
>
> 4. The act occurred between family or household members who resided together at the time or the incident or during the year previous to the incident.
>
> If the State has proven all of these numbered elements, [Benesh] is guilty of assault domestic abuse causing bodily injury. If the State has proven only elements 1, 2, and 3, [Benesh] is guilty of assault causing bodily injury. If the State has proven only elements 1, 2, and 4, [Benesh] is guilty of assault domestic abuse. If the State has proven only elements 1 and 2, [Benesh] is guilty of assault. If the State has failed to prove either element 1 or 2, [Benesh] is not guilty.

(Emphasis added.) The jury returned a verdict finding Benesh guilty of Count II, assault domestic abuse causing bodily injury, and acquitting Benesh of Count I, assault domestic abuse with intent to cause serious injury.

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[3] The State notes that "[b]ecause assault is a general intent crime the wording of the first element of [Instruction 15] was stated incorrectly," citing Iowa Code section 708.1.

[4] Instruction number nineteen defined only the term "bodily injury."

After trial, Benesh filed an amended and supplemental objection challenging the guilty verdict on Count II as inconsistent with his acquittal on Count I. The district court overruled Benesh's objection.

Benesh now appeals.[5]

II. Scope and Standards of Review.

Our review of the district court's ruling on the motion for judgment of acquittal and sufficiency of the evidence is for correction of errors at law. Iowa R. App. P. 6.907 (2009). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). We review the denial of a motion for a mistrial and challenges to interrogation by the trial court for an abuse of discretion. *See State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003); *State v. Cuevas*, 288 N.W.2d 525, 531 (Iowa 1980).

III. Discussion.

On appeal, Benesh contends the district court erred in denying (1) his motion for judgment of acquittal because the jury's finding of guilt on Count II was inconsistent with the jury's acquittal on Count I; (2) his motion for a mistrial,

[5] Although the parties' appendix is not lengthy, we note the names of the witnesses were not inserted at the top of each page where witnesses' testimony appeared. This violation of Iowa Rule of Appellate Procedure 6.905(7)(*c*) may seem inconsequential, but having a witness's name at the top of each page makes our job navigating an appendix much easier. Additionally, the table of contents did not state the name of each witness whose testimony was included and the appendix page at which each witness's testimony begins. *See* Iowa R. App. P. 6.905(4)(*b*). Compliance with the rules facilitates our duty to achieve maximum productivity in deciding a high volume of cases. *See* Iowa Ct. R. 21.30(1).

asserting the court improperly questioned a defense witness displaying bias to the jury; and (3) his motion for judgment of acquittal because there was insufficient evidence on the cohabitation element to support the domestic abuse conviction.

***A. Inconsistent Verdicts*.**

Benesh argues the district court erred in denying his motion for a judgment of acquittal because the jury's finding of guilt on Count II was factually and legally inconsistent with the jury's acquittal on Count I. Specifically, he asserts that

> [s]ince the first two elements [of both crimes] are virtually identical, it is factually and legally inconsistent that the jury could return a verdict where the same essential elements . . . of each crime charged . . . were found both to exist and not to exist.

Instruction fourteen, regarding Count I, instructed the jury that "[i]f the State has proven only elements 1 and 2, [Benesh] is guilty of assault."[6] In finding Benesh guilty of assault domestic abuse causing bodily injury under Count II, the jury necessarily found that the State had proven elements 1, 2, and 4 under Count II. Since elements 1 and 2 under Count II are virtually identical to elements 1 and 2 under Count I, the jury could have at least found Benesh guilty of assault under Count I. It did not. On the other hand, since the jury found Benesh not guilty under Count I, necessarily implying the State had failed to prove either element 1 or 2, it could have found Benesh not guilty under Count II. It did not.

We agree the verdicts are factually inconsistent, but this type of inconsistency in jury verdicts is generally not reviewable, and "appellate review

[6] Instruction fifteen contained the same language.

should be limited to whether sufficient evidence exists to support the verdict returned by the jury." *See State v. Hernandez*, 538 N.W.2d 884, 889 (Iowa Ct. App. 1995). However, an inconsistent verdict may be reviewed if it is "so logically and legally inconsistent as to be irreconcilable within the context of the case." *State v. Fintel*, 689 N.W.2d 95, 101 (Iowa 2004). For example, "[t]he rule dispensing with the necessity of consistency does not necessarily apply where there are multiple convictions, without an acquittal, of mutually exclusive offenses." *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa Ct. App. 1996) (citing *United States v. Powell*, 469 U.S. 57, 69 n.8, 105 S. Ct. 471, 479 n.8, 83 L. Ed. 2d 461, 471 n.8 (1984)). Such is not the case here.

Benesh challenges his conviction on one count of multiple counts solely because it may be inconsistent with the acquittal by the jury on another count. The United States Supreme Court has "held that a criminal defendant could not challenge a conviction on one count of a multiple count indictment solely because it may be inconsistent with an acquittal by the jury on another count." *Hernandez*, 538 N.W.2d at 889 (citing *Dunn v. United States*, 284 U.S. 390, 393, 52 S. Ct. 189, 190, 76 L. Ed. 356, 359 (1932)). "[I]nconsistent verdicts on multiple counts in the same trial do not ordinarily taint the validity of a verdict of guilt." *Fintel*, 689 N.W.2d at 100 (citing *Pearson*, 547 N.W.2d at 241). "Such inconsistencies may result from the jury's exercise of its power of leniency." *Id*. at 101. The jury may just have been reluctant to "pile-on." Accordingly, we decline to interfere with the verdict, and we affirm on this issue.

***B. Motion for Mistrial*.**

Benesh next contends the district court erred in denying his motion for a mistrial, asserting the court improperly questioned a defense witness displaying bias to the jury. As a preliminary matter, the State argues that error was not preserved on the first two questions asked by the court. However, because we find no merit in his claim, we need not rely on error preservation to dispose of the issue he raises and thus will address it on its merits.

A trial judge has the discretion to question witnesses when it is "necessary in the interest of justice." Iowa R. Evid. 5.614(*b*); *Mills v. State*, 383 N.W.2d 574, 578 (Iowa 1986). The court "may ask questions of witnesses in an attempt to clarify testimony and to elicit facts necessary to a clear presentation of the issues." *State v. Dixon*, 534 N.W.2d 435, 441 (Iowa 1995) (citing *United States v. Scott*, 26 F.3d 1458, 1464 (8th Cir. 1994)).[7] However, the practice is not encouraged. *State v. Cuevas*, 288 N.W.2d 525, 532-33 (Iowa 1980).

"By engaging in the examination of witnesses the court becomes vulnerable to a multiplicity of criticisms," including bias, prejudice and advocacy. *Id*. at 533. Thus, the court must strive to "preserve an attitude of impartiality and [guard] against . . . an impression that the court believes the defendant is guilty." *Dixon*, 534 N.W.2d at 441 (citing *Scott*, 26 F.3d at 1464). As a result,

> [w]hen a criminal defendant asserts that a trial judge's comments prevented a fair trial, we will engage in a balancing of the potential prejudice caused by the trial judge's comments and the overall fairness of the trial. Where the judge appears to have lost his or her appearance of neutrality, or appears to have accentuated and

[7] Receded from on other grounds in *State v. Huss*, 657 N.W.2d 447, 454 (Iowa 2003).

> emphasized the prosecution's position, we will find the balance tipped adversely against the fairness of the trial.

Id. (citations omitted). Therefore, we must balance any potential prejudice with the overall fairness of the trial. *Id*.

Here, the record does not indicate the judge's questions emphasized the prosecution's case nor does it show a jury could reasonably have interpreted the questions to mean the judge was siding with the State. Additionally, the questioning at issue did not discredit or impeach the witness's testimony on a key element or defense. The questioning at issue was merely to clarify the record. We cannot conclude the court's limited and impartial questioning, conducted in an effort to elicit testimony it believed necessary to clarify the record, was either an abuse of discretion or served to deprive Benesh of a fair trial. However, we agree that the better practice is for the trial judge to exercise restraint and avoid the fray as by questioning witnesses "the court becomes vulnerable to a multiplicity of criticisms; bias, prejudice or advocacy," particularly where a jury is the fact finder. *State v. Cuevas*, 288 N.W.2d 525, 532-33 (Iowa 1980). We accordingly affirm on this issue.

***C. Sufficiency of the Evidence*.**

Benesh also contends there was insufficient evidence to establish that he and Neelans were household members. Specifically, he argues he and Neelans were not "cohabiting," and he thus could not be guilty of domestic abuse assault.

As stated above, one of the elements of Count II, assault domestic abuse causing bodily injury, required the State to prove "[t]he act occurred between family or household members who resided together at the time or the incident or

during the year previous to the incident." The law defines "family or household members" as persons cohabiting with each other. Iowa Code § 236.2(4).

The term "cohabitating" is not subject to a precise definition. *See State v. Kellogg*, 542 N.W.2d 514, 517-19 (Iowa 1996). The Iowa Supreme Court has stated that "[t]he meaning of persons cohabitating cannot be legally established solely by proving the defendant and victim were living together." *Livingood v. Negrete*, 547 N.W.2d 196, 197 (Iowa 1996). Additionally, the court has explained that "[c]ohabitating is more than simply living together, even though it is not tantamount to marriage." *State v. Mitchell*, 757 N.W.2d 431, 438 (Iowa 2008). In the context of the Domestic Abuse Act, Iowa Code chapter 236, the court has determined that the term "cohabitation" is not so broad as to cover persons that are mere roommates or live in the same apartment building. *See Kellogg*, 542 N.W.2d at 518. Nevertheless, the term "cohabitation" is not so limited as to require proof of a sexual relationship between the parties to establish cohabitation. *Kellogg*, 542 N.W.2d at 518.

To determine whether a couple is cohabitating under the umbrella of chapter 236, our supreme court has adopted the following nonexclusive factors to be considered by a jury in making that determination:

> (1) sexual relations between the parties while sharing the same living quarters;
> (2) sharing income or expenses;
> (3) joint use or ownership of property;
> (4) whether the parties hold themselves out as husband and wife;
> (5) the continuity of the relationship; and
> (6) the length of the relationship.

Id. The determination whether a couple is cohabitating "is a peculiarly factual question which must be answered after examining the situation as a whole. It is appropriate for a jury to decide this." *Id*.

Viewing the evidence in the light most favorable to the State and making all reasonable inferences that may fairly be drawn from the evidence, we find the jury could not have reasonably found that at the time or the incident or during the year previous to the incident, Benesh and Neelans were household members "cohabitating," considering the applicable *Kellogg* factors.[8] There was no evidence presented that Neelans and Benesh held themselves out as husband and wife. Additionally, under this record, we find no substantial evidence to support a finding that Benesh and Neelans had a sexual relationship within a year of the incident. Although Neelans initially testified that she and Benesh's relationship ended in "the winter of '07," she later testified when pinned down to a specific time period that the intimate part of their relationship had been over since October 2007. Benesh similarly testified he had not been intimate with Neelans during the year prior to November 2008. No other evidence was presented

[8] As stated above, element 4 of instruction fifteen required the State to prove: "The act occurred between family or household members who resided together at the time of the incident or *during the year previous to the incident*." (Emphasis added.) Similarly, the cohabitation instruction contained language stating "[t]o determine if [Benesh] and [Neelans] were cohabiting at the time of the alleged offense *or during the year previous to the offense*, ..." (Emphasis added.) Domestic abuse assault means an assault, as defined in section 708.1, which is domestic abuse as defined in section 236.2(2)(a), (b), (c), or (d). Iowa Code § 708.2A(1). Except for section 236.2(2)(d), none of the circumstances listed in section 236.2(2)(a), (b), (c) contain a one-year requirement. Section 236.2(2)(d) is inapplicable to this case since it applies only to cases where the persons, who have been family or household members, are not living together at the time of the assault. It is undisputed that Benesh and Neelans were living together at the time of the incident. Nevertheless, the instructions were not challenged by Benesh, and they therefore stand as the law of this case. *See* Iowa R. Civ. P. 1.924; *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) (stating that failure to object to a jury instruction at the trial court level waives the issue on appeal)).

concerning any intimate relationship between Benesh and Neelans at the time of the assault.

The evidence also did not show that Neelans and Benesh shared income or expenses. Although Benesh remained very good friends with Neelans and continued his living arrangement sharing Neelans's residence and king-sized bed, Neelans testified that after their intimate relationship ended:

> [Benesh] was going to continue to be my roommate, you know, but as far as financially helping me out, he would throw me some money when he could. And I was okay with that, because I wanted him to save up, to be able to afford a down payment or—you know, to be able to get into his own apartment.

Other than "throwing" some money to Neelans when he could, Benesh did not share expenses, split bills, or pay rent. Neelans testified Benesh was a "freeloader for quite a few months."

Although it was undisputed that Neelans and Benesh lived in residence together, most of the time they just met in passing. Neelans worked usually from 2:30 p.m. to 11:00 p.m. and slept nights at the home where she was working as a caregiver, arriving home in the early morning. Benesh worked usually from 5:30 a.m. to 2:30 p.m. In an arrangement akin to the "hot bunks" used in submarines in World War II, Neelans and Benesh shared Neelans's bed.

Considering the applicable *Kellogg* factors, we find the jury could not have reasonably found that Benesh and Neelans were household members "cohabitating" at the time of the incident or during the year previous to the incident. We accordingly conclude the evidence was insufficient to support a verdict of assault domestic abuse causing bodily injury in violation of section 708.2A(2)(b). Although Benesh argues this court should reverse his conviction

and remand for a new trial, he does not challenge the sufficiency of any of the other elements of Count II. Having found Benesh guilty of assault domestic abuse causing bodily injury, the jury necessarily found him guilty of the lesser-included offense assault causing bodily injury. *See State v. Morris*, 677 N.W.2d 787, 788-89 (Iowa 2004). We conclude there was sufficient evidence to support a finding of assault causing bodily injury in violation of section 708.2(2), and we therefore remand the case to the district court to enter judgment on the lesser-included offense of assault causing bodily injury. *See State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999).

***IV. Conclusion*.**

We conclude the district court did not err in finding the verdict was not so logically and legally inconsistent as to be irreconcilable within the context of this case. Additionally, we conclude the district court's limited and impartial questioning, conducted in an effort to elicit testimony it believed necessary to clarify the record, was neither an abuse of discretion nor served to deprive Benesh of a fair trial. Finally, we find the jury could not have reasonably found that at the time of the incident or during the year previous to the incident, Benesh and Neelans were household members "cohabitating" as contemplated under the law. We therefore conclude there was insufficient evidence to support a finding of domestic abuse assault under section 708.2A(2)(*b*). We reverse the entry of judgment and sentence for assault domestic abuse causing bodily injury and remand for entry of judgment and sentence for assault causing bodily injury.

REVERSED AND REMANDED.

Danilson, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I concur on the claim that the jury rendered inconsistent verdicts. I also agree that the jury could not reasonably find that Benesh and Neelens were "cohabitating" for purposes of the domestic abuse assault conviction. I disagree, however, with the majority's conclusion on the trial court's questioning of one of the witnesses, Maureece McDuffee. I would find this questioning was an abuse of discretion and deprived Benesh of a fair trial.

I believe error was properly preserved for our consideration of the issue. "Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present." Iowa R. Evid. 5.614(*c*). Benesh's attorney objected both during the initial questioning and later outside the presence of the jury. Counsel's objections sufficiently alerted the court to the claimed error, and the court ruled on the objection and motion for mistrial.

"When necessary in the interest of justice, the court may interrogate witnesses, whether called by the court or by a party." Iowa R. Evid. 5.614(*b*). This rule allows the court to question witnesses when (1) it is necessary, and (2) it is in the interest of justice. *Mills v. State*, 383 N.W.2d 574, 578 (Iowa 1986). In *Mills*, this rule was interpreted to permit a court to question a witness when the record was obscure on the facts relating to a critical legal element of the case, and there may have been a miscarriage of justice if the court did not clarify the record. *See id.* (noting in trial on charge of false use of a financial instrument, the record was obscure on whether check at issue was payable to order or a

bearer instrument, and finding court was within its discretion in clarifying this point with defendant when he testified, to prevent a miscarriage of justice).

On the record before us, I do not find any indication the court's questions were necessary or in the interest of justice. The court asked why the witness felt ashamed during the incident and why she did not contact the police to give a statement. I do not see how this line of inquiry is relevant to the offense at issue. The court's probing of the witness did not illuminate any facts essential to the elements of the charged crime.

Although the questions may not at first blush seem damaging due to their irrelevance to the offense, the questions were harmful because they were relevant to another issue, the witness's credibility. If the court was attempting to clarify anything, it was to clarify the witness's shame and embarrassment, and explore why she did not proactively make a police report. These facts only pertained to the witness's character and credibility. The questioning did not clarify the witness's account of the incident. The court's clarification of a witness's character or credibility is not necessary or in the interest of justice in a jury trial. "Assessment of a witness's credibility is uniquely within a lay jury's common understanding." *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992).

Aside from general concerns about a court's interference with a jury's duty to make credibility assessments, I believe under the circumstances before us, this court's particular questions deprived Benesh of a fair trial. Benesh's defense was that he acted with justification. He claimed Neelens initiated the contact and he only responded with reasonable force to protect himself. He sought to establish this defense through his own testimony and that of the only eye witness

that was not a participant, Maureece McDuffee. She was the only corroborating evidence to support his self defense claim; therefore, her credibility was a critical aspect of the case.

I also find the timing of the court's questions were harmful to the defendant. The court asked the questions after the State asked McDuffee about her criminal record, and specifically about a previous incident where she was found to be untruthful to police officers. The court's immediate further inquiry about why McDuffee felt ashamed and did not go to the police to file a report on her own volition in the present situation serves no purpose except to portray McDuffee in a negative light in front of the jury. Some of the questions also were not impartially phrased, and appear to be tilted in favor of the State by taking on a leading tone or biased viewpoint. For example,

> "[O]nce it became clear to you that [Benesh] either had been arrested or had been charged, you did not go to the police and give them a statement?"
>
> "How would they have information as to how to get in touch with you? You didn't volunteer who you were."
>
> "Would there have been some other way they could have otherwise identified you, without you coming over, as far as you know?"

When questioning witnesses through the authority granted by rule 5.614(*b*), a "court should conduct itself with scrupulous detachment; it must act as a neutral force in the interplay of an adversary process. It is imperative that the court not become an advocate of any party's cause." *State v. Cuevas*, 288 N.W.2d 525, 531 (1980). After the court asked these questions it stated,

> Does either counsel have any examination based upon *the state's* [sic] two questions—based upon *the court's* two questions?

(Emphasis added.) Although this brief misstatement by the court could have been inadvertent and the court quickly corrected itself, it indicates that the court was perhaps internally viewing the witness from the State's perspective, and it could have easily left this impression with the jury. "Conduct by which the jury could infer bias against any party is to be avoided. *Id.*

Overall, the timing and specific questions suggested to the jury that McDuffee was willing to lie to authorities or had something to hide from authorities and therefore did not want to provide a statement about the altercation. The questioning only pertained to McDuffee's credibility and was an abuse of discretion. Since McDuffee's testimony was an integral part of the defense, I believe the trial court should have granted Benesh's motion for a mistrial. I would reverse his conviction on this basis.